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Supreme Court of the United States

MIKE HATCH,
Attorney General of Minnesota,

Petitioner,

v.

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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STATEMENT PURSUANT TO RULE 29.6

Respondents' corporate disclosure statement was set forth at page *ii* of the Brief in Opposition, and there are no amendments to that statement.

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Supreme Court Rule 15.8, Respondents respectfully submit this supplemental brief in order to address a recent decision of the United States Court of Appeals for the Eleventh Circuit, *National Association of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006) ("*NASUCA*").[1] Contrary to Petitioner's contention, this case does not conflict, "in principle" or otherwise, with the decision of the United States Court of Appeals for the Eighth Circuit in *Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005), Pet. App. 1a-15a ("*Cellco*"). Although both decisions arise under Section 332(c)(3)(A), the type of state laws at issue in each case – and thus the results reached under the statute – are entirely different. Accordingly, as the Solicitor General recently explained on behalf of the United States as *amicus curiae*, there is no circuit split here and the issuance of the Eleventh Circuit decision alters nothing; as the Solicitor General also explained, the issuance of a writ of certiorari to the Eighth Circuit is not warranted.

ARGUMENT

Tellingly, Petitioner does not claim a true circuit split but only a "conflict in principle." Supp. Br. 1. As an initial matter, this "conflict in principle" is framed at such a high level of generality as to be meaningless for purposes of the question whether to grant the petition for certiorari. The scope of States' rights to regulate wireless service under Section 332(c)(3)(A), *see id.*, is such a broad topic that, under Petitioner's theory, an issue worthy of this Court's review would arise every time one Court of Appeals reached a different result with respect to federal preemption under a particular statute than another Court of Appeals, regardless of the nature of the state action at issue or the facts of the case. In any event, a "conflict in principle," as opposed to an *actual* conflict, is insufficient to justify the exercise of this Court's certiorari jurisdiction. "[T]here must be

1. The *NASUCA* decision is reprinted in Petitioner's Supplemental Brief, Supp. Br. 1a-37a, and is not reproduced herein.

a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., Supreme Court Practice § 4.3 (8th ed. 2002).

There is no conflict – in principle or otherwise – between the decisions of the Eighth and Eleventh Circuits. On the one hand, in *Cellco*, the Eighth Circuit adjudicated a direct challenge to a Minnesota statute that effectuated a rate freeze in violation of the express preemption provision in Section 332(c)(3)(A). Specifically, the Court of Appeals had before it a statute, Minn. Stat. § 325F.695 (2004) (codifying 2004 Minn. Law Ch. 261, art. 5) ("Article 5"), that imposed waiting periods on wireless carrier rate changes, in contravention of existing contracts. The Court of Appeals determined that: (i) Article 5's 60-day waiting period for increases in wireless rates freezes rates for at least that period of time; (ii) even accepting the State's argument that the 60-day period is not mandatory, the approval mechanism for rate increases requiring that customers "opt in" fixes rates for those customers who decline to opt in, for the entire term of their existing wireless service agreements; and (iii) even if, contrary to all intuition, some customers agreed to a price increase, the rate would be frozen until that assent was manifested. Pet. App. 9a-10a. With respect to Section 332(c)(3)(A), the Court of Appeals explained that it precludes States from "'fixing rates . . . of providers.'" Pet. App. 9a (quoting *Petition of Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, 1745 (1997), aff'd *Cellular Telecomms. Indus. Ass'n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999) ("*Pittencrieff*")).

Based on these findings, the Eighth Circuit held that a "waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to 'opt in,' has a clear and direct effect on rates" – *i.e.*, by "fixing" rates – and thus constitutes prohibited rate regulation under Section 332(c)(3)(A). Pet. App. 12a. There was no dispute in *Cellco* that the charges at issue constituted "rates" within the meaning of Section 332(c)(3)(A).

On the other hand, in *NASUCA*, the Eleventh Circuit reviewed pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), an order of the Federal Communication Commission ("FCC") finding that state prohibitions and requirements of line item charges on customer bills interfere with wireless rate structures and thus are preempted by Section 332(c)(3)(A). The Eleventh Circuit overturned the FCC's construction of the statute because, in the court's view, the statutory term "rates" does not encompass charges that appear in line items. *See* Supp. Br. App. 29a (holding that "rates" means a "'charge or payment' for service" and that line items are not charges for service). The Eleventh Circuit also rejected the FCC's position that line item mandates have a "direct effect" on rates, finding any connection between line item mandates and rates (as the Court of Appeals understood the term) to be "even more attenuated" than other regulation the Commission previously found not to constitute impermissible rate regulation. *See id.* at 33a.

Clearly, there is no conflict between the holdings of the Eighth and Eleventh Circuits. *See* Stern, *supra* p. 2 ("[A]ny effort to mislead the Court into viewing a conflict in principle as a real conflict is almost invariably futile."). The Eighth Circuit, based on a fact-intensive review of the operation of the challenged state law, concluded that Article 5 created a rate freeze and thus was preempted under Section 332(c)(3)(A) because it effectively fixed (and thus had a clear and direct effect on) rates. The Eleventh Circuit, by contrast, held that the FCC's construction of Section 332(c)(3)(A) as preempting line item mandates was contrary to the plain meaning of the statute because line items are not "rates" and because line item mandates do not have a direct effect on "rates."[2]

2. Moreover, the decision of the Eleventh Circuit is not yet final. Petitions for panel and en banc rehearing of that decision were filed by the wireless industry and the FCC on September 14, 2006. This lack of finality is yet another reason to deny certiorari. *See* Stern, *supra* p. 2 ("A well-established ground for granting certiorari . . . is the existence

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There is not even any inconsistency between the Eighth and Eleventh Circuits' understanding of Section 332(c)(3)(A). Indeed, both decisions make clear that state action that fixes or sets wireless rates is preempted under the statute, citing the same FCC decision with apparent approval. *Compare Cellco*, Pet. App. 9a (stating that "'fixing rates of . . . providers' is rate regulation") (quoting *Pittencrieff* at 1745), *with NASUCA*, Supp. Br. App. 30a (stating that "the phrase 'rates charged' prohibit[s] states from prescribing, setting or fixing rates of wireless service providers") (citing *Cellular Telecomms. Indus. Ass'n*, 168 F.3d at 1336 as quoting *Pittencrieff* at 1745, which held that "prescribing, setting, or fixing rates" is preempted). Thus, both decisions *support* the proposition that fixing or prescribing carriers' rates is preempted.

And contrary to Petitioner's suggestion, *see* Supp. Br. 2, the Eighth Circuit did not adopt a definition of "rates charged" that differs from the Eleventh Circuit's. In fact, the Eighth Circuit did not define that term *at all*. It was undisputed below that Article 5 affected "rates"; the question was whether the statute affected them in a way that constituted prohibited regulation. While Petitioner argued that the statute only regulated the contract change process, not prices for wireless service, the Eighth Circuit (correctly) disagreed.

Petitioner also asserts an "apparent split" between the Circuits on the validity of wireless-specific laws, as opposed to laws of general applicability, under the "other terms and conditions" language of the statute. *See* Supp. Br. 3. This "apparent conflict," *id.* at 4, is based on a hypothetical tension between a "suggest[ion]" in *NASUCA* that States may take either approach (an issue Petitioner admits the Eleventh Circuit "did not expressly address," *id.* at 3), and the possibility that *Cellco* "could be read," *id.*, to limit state action to laws of general applicability. Petitioner articulates a concern about "the risk that conflicting decisions throughout the

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of a conflict between the decision as to which review is sought and that rendered by . . . some lower court *whose judgment is final in the absence of Supreme Court review*." (emphasis added)).

country may emanate" from these two opinions. *See id.* But "apparent" or hypothetical future conflicts based on what are admittedly nothing more than inferences from the Eighth and Eleventh Circuit decisions are not the proper basis for certiorari.

Nor does the Eleventh Circuit opinion create "more uncertainty and confusion" about the scope of state authority under Section 332(c)(3)(A). Supp. Br. 5. Under the Eighth Circuit's ruling, States may not pass laws or adopt regulations that, like Article 5, fix rates by imposing a freeze on wireless rates for any period of time. Under the Eleventh Circuit's decision, which vacated the FCC's order on express preemption, States presently are no longer constrained by the agency's determination that line item mandates are prohibited by Section 332(c)(3)(A). There is no greater uncertainty now, following the issuance of the decision in *NASUCA*, than there was at the time the petition for certiorari was filed. Quite the contrary, States now have more judicial guidance about the regulatory boundaries set by Section 332(c)(3)(A) than they did before.

In sum, Petitioner's effort to manufacture a conflict should be rejected. The Eleventh Circuit held that line item mandates fall within permissible regulation of "other terms and conditions" chiefly because line items are not "rates charged." The Eighth Circuit concluded that a wholly different type of state action – the imposition of a freeze on what were indisputably "rates charged" – amounted to prohibited rate regulation. The two decisions do not adopt conflicting rules of law but simply apply Section 332(c)(3)(A) to two different types of state action and reach different conclusions as to express preemption. This does not yield anything close to a circuit split, much less a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923).

CONCLUSION

For the foregoing reasons, and all those stated in the Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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